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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

FRANCIS X. GOMILA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. **1282.**

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals for the Sixth Circuit and SUPPORTING BRIEF.

**THOMAS L. ROBINSON,
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Counsel for Petitioner.

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No.

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner was convicted in the United States District Court at Memphis, Tennessee, on three counts (Nos. II, III, IV), of a four count indictment, alleging violations of various sections of General Ration Order No. 8 and Second Revised Ration Order No. 3, relating to sugar rationing, issued pursuant to Title III of the Second War Powers Act, as amended (50 U. S. C. App., Sec. 633 et seq.).

Petitioner was sentenced to a prison term of one year under each of the three counts on which he was convicted, the periods of imprisonment to run concurrently, and to pay a fine of Two Thousand (\$2,000.00) Dollars on each of these counts, and, as a condition of the stay of execution, was required to execute, and did execute, a supersedeas bond in the amount of Six Thousand (\$6,000.00) Dollars, conditioned for the payment of the fine (R. 23, 24, 30).

The Circuit Court of Appeals affirmed the judgment of conviction (R. 289). Its opinion appears at pages 390 et seq. of the record.

A. The Applicable Statute.

The statutory basis of General Ration Order No. 8 and Second Revised Ration Order No. 3 is Title III of the Second War Powers Act, as amended (50 U. S. C. App., Sec. 633).

Section 2 (a) (2) authorizes the President to allocate material or facilities, as follows:

“Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.”

Section 2 (a) (8) thus authorizes the President to delegate the powers above conferred:

“The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.”

Section (a) (5) prescribes penalties for wilful violations of the statute or any rule, regulation, or order issued hereunder, as follows:

"Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

Subsection (a) (6) expressly confers upon the District Courts of the United States jurisdiction of criminal and civil violations of Section 2 (a) of the statute and of any rule, regulation, or order issued under its provisions.

B. Regulations Involved and Action of the Jury Thereon.

Count I charged that petitioner "did unlawfully, knowingly and wilfully acquire, and use, and possess, and transfer 600, more or less, counterfeited No. 36 consumer sugar ration stamps or documents, **knowing and having reason to believe** that the aforesaid sugar ration documents or stamps were counterfeited, all in violation of Section 2.5 of General Ration Order No. 8, as amended, * * *." He was acquitted of this charge.

The respective charges under Counts II, III and IV, on which verdicts of guilty were returned, are as follows:

Count II: That petitioner acquired, possessed, controlled, used and transferred 600 counterfeit consumer ration sugar stamps (No. 36) under circumstances which were a violation of General Ration Order No. 8, Section 2.6, if the ration stamps had been genuine, in that petitioner was a registered industrial user of sugar, and as such

could not lawfully acquire, possess, control, use and transfer consumer ration documents or stamps under the provisions of Sections 3.3, 7.2 and 18.1 of Second Revised Ration Order No. 3.

Count III: That petitioner unlawfully, knowingly and wilfully acquired and possessed 3,000 pounds of sugar in violation of Sections 2.8 and 2.9 of General Ration Order No. 8, as amended, and Sections 3.3, 3.18 and 18.1 of Second Revised Ration Order No. 3, **in that the amount of sugar thus obtained was in excess of the allotment granted to petitioner as a registered industrial user of sugar.**

Count IV: That petitioner unlawfully, knowingly and wilfully received 3,000 pounds of sugar in violation of Sections 2.9, 2.6 and 2.5 of General Ration Order No. 8, as amended, and Sections 3.3, 7.2 and 18.1 of Second Revised Ration Order No. 3, in exchange for the ration stamps described in Counts I and II, knowing or having reason to believe that these stamps had not been validly issued and acquired in accordance with a ration order by petitioner as the person tendering these ration documents or stamps.

Relevant sections of General Ration Order No. 8, as amended, referred to in the indictment, are as follows:

2.5: "No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of Section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged."

2.6: "No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was ac-

quired in accordance with a ration order or except as otherwise provided by a ration order. No person shall transfer a ration document except in accordance with the provisions of a ration order."

2.8: "No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order."

2.9: "No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it."

Sections 3.3, 7.2, 318, 18.1 of Second Revised Ration Order No. 3, regulating allotments of sugar to industrial users, the use of sugar stamps, ration banking, and defining terms used in the regulations, are referred to in the indictment but are not believed to be material in the determination of the issues presented by this petition. However, the material parts of these regulations are set out in the appendix.

Preliminary to a discussion of the facts, we set out another regulation, not referred to in the indictment but believed to be material in determining whether the motion for a directed verdict should have been sustained. This is Section 9.1 of Article IX of the Second Revised Ration Order No. 3, issued November 14, 1944, relating to the rationing of sugar:

"Delivery of sugar for carriage or storage. Any person may deliver sugar to any other person for carriage or storage without getting evidences. The sugar may thereafter be delivered by such other per-

son, without getting evidences, either to the person from whom the sugar was received, or to a person to whom the right to receive such sugar has been transferred under this order."

C. Theories of the Parties.

The theory of the government, as charged in Count II of the indictment, is that petitioner, as a **"registered industrial user of sugar,"** unlawfully acquired as such a user, 3,000 pounds of sugar through the use of consumer ration documents or stamps that could not be used by a registered industrial user of sugar; as charged in Count III, that petitioner, as a **"registered industrial user of sugar * * * acquired and possessed"** 3,000 pounds of sugar in excess of the allotment granted to him as a **registered industrial user of sugar**; and, as charged in Count IV, that petitioner knowingly and willfully received 3,000 pounds of sugar through the use of ration documents that could not be lawfully issued to or used by an industrial user of sugar, this count specifically alleging, among other things, a violation of Sections 3.3, 7.2 and 18.1 of the Second Revised Ration Order No. 3 relating to industrial users of sugar (R. 2-4).

It is the theory of petitioner: (1) that while he was entitled, when the 3,000 pounds of sugar were obtained, to an allotment as an industrial user of sugar in excess of 25,000 pounds, he did not acquire the sugar involved in the indictment in the capacity of an industrial user, but as the agent and representative of a wholesale grocery establishment owned by him; (2) that this wholesale grocery establishment, owned by him, lawfully acquired the ration documents or stamps used by him; and (3) that the use of such stamps is entirely immaterial for the reason that the sugar was obtained for storage and that it could have been lawfully obtained by petitioner for that

purpose without ration documents or stamps (Art. IX, Sec. 9.1, 2nd Rev. Ration Order No. 3). It is the contention of petitioner that his theory was established by evidence that is either undisputed or not fairly disputable in the record.

D. The Facts.

(1) On June 29, 1945, the date petitioner acquired the 3,000 pounds of sugar involved in the indictment, the St. Bernard Syrup Company, an industrial establishment owned and operated by petitioner, was entitled to a sugar allotment in excess of 25,000 pounds (R. 151, 268).¹

(2) However, petitioner did not obtain the 3,000 pounds of sugar involved in the indictment as an industrial user, but as the agent and representative of the Peerless Sugar Company, a wholesale grocery establishment in New York operated under that name for a period of fifteen years and acquired by petitioner under contract of purchase prior to June 29, 1945 (R. 276, 297, 321, 330, 341, 342, 348). The Peerless Sugar Company, both before and after it was acquired by petitioner, was registered with the OPA in New York (R. 384).

(3) The sugar was not acquired by petitioner for immediate use either by the wholesale grocery establishment or by the industrial plant of the St. Bernard Syrup Company, but for storage until such time as the latter was issued sugar rationing documents it was clearly entitled to receive. Petitioner then believed and had a right to believe that the issuance of the ration evidences to the St. Bernard Syrup Company was in process of consummation (R. 268, 269, 270, 272, 273, 276, 295, 342). The issuance

¹ Mrs. Moyer, a Government witness, employed by the District Office of the OPA at New Orleans, thus testified:

"Q. In June of 1945, according to St. Bernard Syrup Company's registration, St. Bernard Syrup was entitled to at least 30,000 pounds of sugar, wasn't it, Mrs. Moyer?

A. Yes, sir" (R. 151).

of the ration evidences only required the transfer or return of the St. Bernard Syrup Company file from the District Office of the OPA at New Orleans to the District Office at Memphis, Tennessee (R. 270).

(4) Petitioner did not receive the sugar allotment to which the St. Bernard Syrup Company was legally entitled because of the arbitrary, illegal and fraudulent action of officials of the OPA at New Orleans, which was apparently condoned, if not sanctioned, by representatives of the OPA at Memphis, Tennessee.

Undisputed facts, establishing the statement just made, are as follows:

Petitioner was interested in two industrial establishments that were registered users of sugar, the X-L Sales Company, a partnership composed of petitioner and his three brothers (R. 308, 372), and the St. Bernard Syrup Company, owned by him, as above stated, individually. These establishments were separate and distinct units (R. 155, 156, 251).

The St. Bernard Syrup Company was a trade name under which petitioner purchased a syrup and beverage business, known as The Victory Cola Company (R. 264), from the Memphis Tobacco Company, Memphis Tennessee, September 19, 1944 (R. 144, 145, 182). The purchase included the sugar base and right to future allotments predicated thereon that had been previously fixed for the syrup and beverage business of the Memphis Tobacco Company by the District Office of the OPA at Memphis and approved by the Office of Price Administration at Washington (R. 140, 141, 142, 171, 173, 175). Notice of such sale and purchase was duly furnished the District Office of the OPA at Memphis, which had jurisdiction of the matter. Simultaneously with that notice, petitioner, on appropriate OPA forms, requested a transfer of the

purchased business, including fixtures and equipment of the syrup plant and its sugar base, from Memphis to Chalmette, Louisiana (R. 177).

The application for a transfer was granted by the Memphis District Office of the OPA (R. 177). The procedure followed in the transfer, approved by officials of that office, including its attorneys, and by the attorney for petitioner, strictly complied with the applicable OPA regulations (R. 145, 177). The transaction was consummated through Memphis and New Orleans banks (R. 265, 266).

In connection with the transfer, petitioner registered under the trade name of St. Bernard Syrup Company, his application showing that this was a trade name, and the OPA District Office in Memphis issued the allotment to the Syrup Company instead of to petitioner personally (R. 182). Thereafter, the St. Bernard Syrup Company registered with the local board of the OPA at Chalmette, Louisiana, which recognized the validity of the transfer and granted it a sugar allotment for the first quarter of 1945, amounting to 21,475 pounds, computed on the sugar base originally fixed by the District Office of the OPA at Memphis and approved by the Washington Office (R. 147, 148, 173, 266).

The sugar base of an industrial user was governed by the amount of sugar used by the registrant in 1941. Allotments, granted quarterly and constituting a percentage of the sugar used during the corresponding quarter in 1941, were not uniform but varied with each quarter (R. 167, 168). After the base had been fixed, the registrant was required to make application for future allotments but they were granted as a matter of course unless there had been a change in the conditions existing when the base was fixed and were usually issued by ministerial clerks (R. 172, 244, 245).

When the base had been fixed, no change could properly be made in the allotments without notice to the registrant (R. 176, 177). Application for an allotment was usually made 15 days before the expiration of the current allotment but could be made five days after the previous quarterly period had expired (R. 182).

On or about March 13, 1945, and before application could be made, under the regulations, to the Board at Chalmette, Louisiana, for an allotment for the St. Bernard Syrup Company for the second quarter of 1945, all industrial files from local boards in New Orleans and adjacent areas were transferred to the District Board in that City (R. 242, 245). Thereafter, application for the allotment was made to the District Board but action thereon was withheld by one Thibaut, District Sugar Rationing Officer (R. 243, 244).

There had been no change in operations or conditions since the fixing of a sugar base and granting of the allotments thereon to the St. Bernard Syrup Company by the District Office of the OPA at Memphis and the OPA local board at Chalmette, Louisiana (R. 268, 277), nor was there any claim of misrepresentation or concealment in connection with the Memphis Tobacco Company or the St. Bernard Syrup Company transaction nor any suggestion by the Louisiana OPA officials that the St. Bernard Syrup Company was not entitled to an allotment for the second quarter of 1945 (R. 268, 269).

When petitioner, on or about March 15, 1945, through his auditor, who usually handled such applications, applied for the second quarterly allotment for the St. Bernard Syrup Company and also for the allotment due the X-L Sales Company, he was advised that, under a change in the rules, no allotments would be issued until the 1st of April (R. 360).

The auditor returned on the 1st of April and thereafter "again and again and again" in an effort to obtain the allotments or to ascertain the reason why action thereon was being withheld. Thibaut was absent from the office on the 1st of April but present on the other occasions and every time would ask the auditor to return or call him at a later date. This course continued until the auditor reached the conclusion that his efforts to obtain the allotments or information as to why they were being withheld were "hopeless or useless" and he suggested to petitioner that he turn the matter over to his attorneys (R. 360, 361).

In one of his conversations with petitioner's auditor, Thibaut expressed the opinion that the District Office of the OPA at Memphis was in error when it transferred the syrup and beverage business purchased by the St. Bernard Syrup Company from the Memphis Tobacco Company to Louisiana. Thibaut then assigned no reason for such an opinion (R. 360, 361) and stated none in his testimony (R. 243).

The right of the St. Bernard Syrup Company to an allotment on the sugar base acquired by it from the Memphis Tobacco Company not being questioned, petitioner, to avoid any jurisdictional controversy and to obtain the allotment without further delay, requested, on appropriate OPA forms, that the business purchased by him from the Memphis Tobacco Company be transferred back to Memphis. Thibaut promised that this would be done and that the file of the St. Bernard Syrup Company would be returned to the Memphis Office of the OPA (R. 153, 154, 247, 248, 266, 267, 268, 362, 363).

After petitioner filed the application for the re-transfer of the St. Bernard Syrup Company business and the return of the file to Memphis, his auditor and New Orleans

attorneys made repeated visits to the office of Thibaut to ascertain the status of the matter and the location of the St. Bernard Syrup Company file (R. 191, 362-365). Once they were told by Thibaut that the file was en route from the Regional Office of the OPA at Dallas to the District Office at New Orleans and, again, that the file had been lost (R. 368). However, when the auditor went back a few days after he had been told the file was lost, Thibaut located it on an adjoining desk in his own office (R. 358). Thereupon, he informed the auditor that the file and the necessary papers for the re-transfer of the business were being sent back to Memphis (R. 363).

Petitioner, then in New York, on being notified by his auditor that this was being done and that when the file reached Memphis he would be entitled to the sugar allotment of the St. Bernard Syrup Company,² called his Memphis attorney, Thomas L. Robinson, told him the file was being transferred to Memphis and instructed him to get in touch with the Memphis Office of the OPA (R. 269). This the attorney did and advised petitioner that the

2 "Q. Mr. Gomila, when you came to Memphis, or did you come to Memphis some time in June, 1945?

A. Yes, sir.

Q. And when you came to Memphis did you know or have any reason to believe that there was any reason why that transfer was not in process of consummation, that there was any objection to it on the part of any one?

A. No, sir.

Q. And I will ask you to state whether or not any complaint was made to you, or any criticism or suggestion by the OPA officials in New Orleans or Memphis that there had been any misrepresentation or any misstatement on your part in this St. Bernard-Victory Cola transaction?

A. No, sir.

Q. And if I am correct you were informed that there was no objection, and that your request for a transfer would be granted?

A. Yes, sir.

Q. Was there any suggestion on the part of the Louisiana OPA officials or any one else that you were not entitled to that allotment?

A. No, sir (R. 268).

Q. Were you informed by your auditor on the purported authority of the OPA officials in New Orleans that you would get this allotment when the file was returned to Memphis?

A. Yes, sir" (R. 270).

Memphis Office had requested the return of the file (R. 270). This request was made in a letter written from the District Office in Memphis to the District Office of the OPA at New Orleans May 5, 1945 (R. 191). When this letter was written, Stewart, Sugar Rationing Officer of the District Office of the OPA at Memphis, assured petitioner's attorney that as soon as the file was sent back he would notify him, but this promise was not kept (R. 196).³

Relying upon the integrity of the promises thus made by the New Orleans District Office and the Memphis District Office of the OPA through Thibaut and Stewart, respectively, petitioner not only obtained and stored the sugar involved in the indictment but expended in plant construction and improvements at Memphis a sum in excess of \$25,000.00 (R. 272, 273).

Petitioner, failing to receive notice that the St. Bernard Syrup Company file, shuffled back and forth between OPA offices in Dallas, New Orleans and Memphis (R. 191, 195, 247, 248, 367, 368), had reached the Memphis office, made repeated efforts, through attorneys in Memphis and in New Orleans, to ascertain what had happened to it but without success (R. 271, 272, 362-365).

Still trying to locate the file, petitioner, when this case was first set for trial, this being several months before it was actually tried, beginning March 18, 1946 (R. 35), assuming that the file was still in New Orleans, issued and had served a duces tecum subpoena on the custodian of the OPA records in that City, asking the production of

³ Stewart, a Government witness, thus testified on cross-examination:

"Q. Isn't it a fact that you told me that you were requesting the file, and there is your letter requesting it, stating that the local attorney here had consulted you about the matter, and that as soon as the file was sent back you would notify me?

A. That is right.

Q. Now, the file did come back, and you didn't notify me, did you?

A. We didn't notify you" (R. 196).

this file, but this resulted in no information to petitioner or his attorneys (R. 194). This file was produced, however, at the trial by the OPA attorney at Memphis, and it developed that it had been originally returned to the Memphis office of the OPA sometime between May 5 and November 17, 1945, and was thereafter loaned by the Memphis office to an investigator of the New Orleans office and again returned from that office to Memphis shortly after November 17, 1945, but no notice thereof was given petitioner (R. 191, 194, 195).

Petitioner's first information that the St. Bernard Syrup Company file had been returned to the Memphis office of the OPA was obtained when it was produced in court March 18, 1946, this being about ten months after he had been assured by Thibaut that it was being sent back to Memphis (R. 363) and promised by officials of the Memphis office that he would be notified when it was returned (R. 194, 196, 283).

(5) As conceived by us, the refusal of an allotment to the X-L Sales Company, operating on a much larger scale than the St. Bernard Syrup Company, was also purely arbitrary and in flagrant violation of applicable OPA regulations. The facts so showing are not material in determining whether the motion for a directed verdict should have been sustained. So far as relevant to other issues raised by the petition, the facts relating to the refusal to grant an allotment to the X-L Sales Company for the second quarter of 1945, and succeeding quarters, will be stated in the brief.

(6) Petitioner was acquitted on the charge set out in Count I that he knowingly and wilfully used, possessed and transferred 600 counterfeit No. 36 consumer ration stamps or documents (R. 2, 22). It appears without dispute in the record that neither Blen, the Memphis retail

grocer from whom the sugar was obtained, nor petitioner had any reason to believe or suspect that these stamps, which appeared to be genuine, were counterfeit, that both of them acted in good faith in the sugar transaction involved in the indictment, and that petitioner, when he obtained and stored this sugar as an agent and representative of the Peerless Sugar Company, believed that he had a legal right to do so (R. 62, 63, 65, 101, 104). The facts with respect to the character of these stamps will be more fully stated in the brief in discussing the claimed error of the Court in admitting evidence that the stamps were not genuine.

E. Errors in Rulings on Evidence.

“Mr. Gwinn: If Your Honor please, the motion I want to make, and I am making it with the idea that it should be disposed of before the next witness testifies, is that the Court now exclude from the consideration of the jury all the evidence with respect to the operations of the several units which were later consolidated under the X-L; all the evidence as to the quantity of sugar obtained and used by those companies; all the evidence with respect to the processing of syrup or other products by Pepsi Cola; all evidence about the processing of 95,000 pounds or approximately that amount by enterprises of Mr. Gomila for the Doctor Nut Bottling Company; and all the transactions with respect to the original registration of those units and those companies; for the reason that they have no relevancy to the issues in this cause, are not within the scope of the indictment, and are obviously designed to create an unfair prejudice against the accused, and particularly in view of the emphasis placed upon the quantity of sugar that was granted the defendant as a result of these operations or applications; and for the further reason that these applications were passed upon in due course of the operation of the Office of Price Administration by the accredited official agencies, and in the absence

of any evidence that defendant made any false statements or false representations that the Court cannot now have the jury sit in review of the acts of those agencies, the one at Houma, Terrabonne, and all these various other places where the OPA had official boards, and that the purpose of that evidence is to divert the attention of the jury from the material issues of the case, and that it has no real relevancy to any question involved in the trial of this case" (R. 354, 355).

When this motion was made, overruled and exception taken, the following matters relevant thereto had been established by undisputed evidence:

(1) There was no claim of misrepresentation or concealment in connection with the applications for registration, allotments or uses of sugar filed with the OPA by the X-L Sales Company (R. 268, 337, 338, 341).

(2) All changes in the names of bottling companies or plants acquired by the X-L Sales Company, including the adoption of new trade names, all removals of equipment or machinery from one place to another, all consolidations of different businesses under the trade name of X-L Sales Company, the removal of its principal office from New Orleans to New York City, and all changes in its business operations, such as making syrups instead of extracts or having syrup manufactured for it by other concerns like Pepsi-Cola instead of making it directly, were duly reported to and sanctioned by boards and district offices of the OPA then having jurisdiction over these matters (R. 239-241, 242, 243, 246, 254, 301, 304, 305, 306, 307, 308, 313, 314, 337, 338, 339, 358, 359, 360, 366, 370).

(3) That the contention of Thibaut, first disclosed at the trial, that the Lirette Bottling Company, one of the companies operated by the X-L Sales Company, should

have been registered under the name of the Lirette Bottling Company instead of the trade name "Mission Orange Bottling Works," later changed to X-L Sales Company, was destitute of either legal or factual basis (R. 238-244).

(4) That the sole purpose of the Government in going into the organization of the five bottling companies that were operated under the trade name of X-L Sales Company, and the purchase thereof by that Company, and in emphasizing the large amount of sugar, approximately 4,500,000 pounds, allotted it between August, 1942, and December, 1944, was to create an unfair prejudice against petitioner on account of the extent and magnitude of his operations that extended to thirty-seven different states (R. 309-315, 335).

Other rulings on evidence complained of by petitioner include:

(a) The Government witness Thibaut was permitted to testify, over the objection and exception of appellant (R. 226-228) that his failure to act upon petitioner's applications for allotments was confirmed by the Regional Office at Dallas, Texas. The records, if any, of any official action taken by that office were not introduced. The confirmation was an inter-office teletype communication, introduced in evidence over appellant's objection and exception (R. 227-228), and reads as follows: "Washington advises no allotment be issued the X-L Sales Company pending the decision by Enforcement." It was signed by B. E. Trigg, Regional Food Rationing Officer. No notice of this confirmation was given petitioner or his attorneys (R. 230). In connection with their objection to the introduction of this inter-office teletype communication, petitioner called for the official records, showing the ground on which petitioner was denied the allotments due the

X-L Sales Company, but these were not produced (R. 224-227).⁴

(b) The Government witness, Mrs. Lettie Lastinger, introduced by the Government as an expert witness as to the character of the sugar stamps involved, was permitted, over the objection and exception of petitioner, to testify that she had testified as an expert witness on ration documents and as a verification specialist approximately thirty times in Federal courts (R. 97).⁵

F. Petitioner Denied a Fair and Impartial Trial.

Extraneous prejudicial matters were repeatedly injected into the proceedings by the Government attorney and by officials of the OPA, who testified as witnesses in the case, in an apparent studied effort to create an unfair prejudice against petitioner. These include (1) the assertion that criminal proceedings were contemplated against him in the Federal Court at New Orleans (R. 195); (2) the statement by the Government witness Thibaut that he "had made an audit of the X-L violation", the nature of this violation not being disclosed (R. 247); (3) the statement that petitioner's case had been turned over by the Enforcement Division of the OPA to the United States District Attorney in New Orleans (R. 249); (4) the unsupported assertion that petitioner had violated the condi-

⁴ It will be observed that this confirmation was restricted to the X-L Sales Company, no mention therein being made of the St. Bernard Syrup Company, whose right to an allotment under the applicable regulations was not questioned by Thibaut, who apparently claimed that it should be made by the Memphis rather than the New Orleans office of the OPA (R. 266, 268).

⁵ This witness, prior to her employment in the Atlanta Verification Center of the OPA, was a general clerk in the office of the Sinclair Refining Company at Atlanta and her training in the examination of ration documents consisted of a 4-weeks course of instruction from two so-called experts from the United States National Coding Office at Washington, whose training and experience were not known to the witness (R. 105). She testified that in her examination of these stamps, she did not use lights or chemicals but tested them with her eyes alone and, on the ground that her testimony was without probative value, petitioner moved its exclusion. The motion was denied (Tr. 374).

tions under which the business purchased from the Memphis Tobacco Company was transferred to Louisiana (R. 201); and (5) the effort, through an unfair and improper question, asked petitioner on cross-examination, to convey to the jury the impression that he had made a false statement with respect to the balance of ration points and his sugar inventories left over from 1944 (R. 311, 313).

G. Statute and Regulations Invalid.

Petitioner by demurrer which the Court overruled challenged the constitutionality of the statute (Sec. 633 et seq., Title 50 USC App.), if construed as authorizing General Ration Orders 8 and 3, and also the validity of the regulations on grounds therein set forth (R. 9, 10). This challenge was renewed in the motion for a directed verdict (R. 11, 12).

Petitioner, prior to arraignment, filed a petition for leave to file an application in the Emergency Court of Appeals to have that Court determine the validity of the regulations involved (R. 5-8). It was denied.

The Circuit Court of Appeals held that the Statute was valid (R. 394), but declined to pass upon the validity of the regulation, holding that exclusive jurisdiction to do so was vested in the Emergency Court of Appeals (R. 394).

It so held despite the fact that it was conceded in the argument in that Court by both counsel for the Government and for Petitioner, that the Circuit Court of Appeals had jurisdiction to pass upon the validity of the regulations which were not promulgated under the Emergency Price Control Act (50 USC App., Sec. 901 et seq.), but under the Second War Powers Act (50 USC App., Sec. 633 et seq.) (R. 400-403).

H. Statement of Questions Involved.

1. Should a conviction be sustained under a count in an indictment which charged that the accused unlawfully and willfully acquired, possessed, controlled, used and transferred ration stamps **as an industrial user**, where the undisputed evidence shows that he did not acquire, use, possess or transfer such stamps as an industrial user, but as the agent and representative of a registered wholesale grocery establishment which had the right to acquire such stamps in the conduct of its business?

2. Should a conviction be sustained under an indictment which charged that the accused, as a registered industrial user of sugar, acquired and possessed 3,000 pounds of sugar in excess of any allotment of sugar granted to him where the undisputed evidence shows that, as such industrial user, the allotment to which he was then entitled was at least 25,000 pounds?

3. Should a conviction be sustained, under the circumstances stated in Question 2 hereof, where the allotment to which the accused was legally entitled was arbitrarily withheld from him and the records so concealed or shuffled between OPA agencies as to make it impracticable, if not impossible, for the accused to obtain a review of the arbitrary and illegal action of the agencies, and particularly when the accused obtained the sugar in good faith, with the intent of storing it until his allotment as an industrial user was granted and ration evidences predicated thereon issued to him, which he was assured, upon the authority of OPA officials, would be done without further delay, but which was not done and no reason for failing to do so ever given him or his attorneys?

4. Are the judgments of conviction herein void in that:

(a) The regulations under which appellant was convicted are not within the framework of any legislative

standards established by the applicable statute, Sections 633 et seq., Title 50, U. S. Code, Appendix!

(b) The regulations involved are so inconsistent, contradictory, intricate, complex and confusing that it cannot be told with reasonable certainty what acts are prohibited by the regulations?

(c) Said statute, as it applies to the acts for which appellant was convicted, is unconstitutional in that it contains no notice or warning that such acts constitute or may be made criminal offenses?

5. Was petitioner denied a fair and impartial trial through the injection of extraneous prejudicial matters into the proceedings?

6. Did the Circuit Court of Appeals err in refusing to apply corrective processes to claimed errors of the Trial Court in rulings on evidence?

JURISDICTION.

Jurisdiction is invoked under section 240 of the Judicial Code and the applicable rules of this court as stated in the brief.

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) In holding that Section 2 (a) (2),⁶ Title III of the Second War Powers Act (50 U. S. C. App., Sec. 633) prescribed sufficiently definite legislative standards to authorize the regulations involved herein, the Circuit Court of Appeals decided an important constitutional question

⁶ Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in supply of any material, or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

that had not theretofore been decided by this court. **Yakus v. United States**, 321 U. S. 414, cited by the Circuit Court of Appeals (R. 394) as sustaining the validity of the challenged statute, dealt with the Emergency Price Control Act and not the Second War Powers Act. The precise question presented for adjudication is whether the statute is valid if construed as authorizing the particular regulations involved in the indictment and not the sufficiency of its standards as these might affect other and different regulations. It is well settled that a statute may be constitutional as applied to one set of facts and circumstances and unconstitutional when applied to another and different set of facts and circumstances. **Abbie State Bank v. Bryan**, 282 U. S. 765.

(2) In holding that it was foreclosed from considering the attack upon the validity of the regulations because jurisdiction to determine the validity thereof was exclusively in the Emergency Court of Appeals, the Circuit Court of Appeals decided an important federal question that has not been determined by this court. Moreover, its holding on the jurisdictional point is in conflict with the decisions of the Emergency Court of Appeals in **Illinois Packing Company v. Bowles** (Em. App.), 147 F. 2d 554; **Oswald & Hess Co. v. Bowles** (Em. App.), 148 F. 2d 543, 546, which held that the jurisdiction of that court is limited to review of regulations or orders issued under the Emergency Price Control Act. The regulations involved herein were issued under the Second War Powers Act.

(3) The prosecution is tainted with arbitrary, oppressive and fraudulent acts of OPA officials that should not be sanctioned or condoned by the courts. If there was any irregularity or technical infraction of an OPA regulation by petitioner in obtaining this sugar, which he did in good faith, then the OPA agencies were morally responsible for it. Except for their action, there would

have been no occasion for even a technical irregularity in obtaining the sugar involved. We suggest an analogy to the rule against entrapment which is designed not for the protection of the accused but to protect the Government from the illegal conduct of its officers. (See dissenting opinion of Justice Brandeis in *Casey v. United States*, 276 U. S. 413, 425.) The conduct of the OPA agencies herein may aptly be described in language used by the Supreme Court in *Sorrells v. United States*, 287 U. S. 435, 444, which refers to entrapment as "unconscionable, contrary to public policy, and to the established law of the land."

(4) There is no evidence that the Peerless Sugar Company, represented by petitioner, unlawfully received the sugar ration stamps. If there was even a technical violation of any regulations by that Company or by petitioner, it was the failure to deposit these stamps in a ration bank account. No such offense, however, is charged in the indictment and it would be a denial of due process to convict petitioner for an offense not charged in the indictment. *Berger v. United States*, 295 U. S. 78, 79 L. Ed. 1314; *Stewart v. Michigan*, 232 U. S. 665; *Guilbeau v. United States*, 5th Cir., 288 Fed. 731.

(5) The undisputed evidence shows that petitioner, when he obtained the sugar involved, believed, and had a right to believe, that he would receive his allotment as an industrial user and ration evidences predicated thereon without further delay and that thereafter he could lawfully use the sugar by surrendering to the Peerless Sugar Company such ration evidences in an amount equal to the value of the stamps obtained from that Company (R.). His good faith should be a complete defense to the charge. The Circuit Court of Appeals apparently held to the contrary (R. 393).

The statute (Title 50, App. Sec. 633, et seq.) only provides penalties for wilful violations of the Act, and there is no substantial evidence of any wilful violation of the Act by petitioner.

Whatever may be the precise definition of the words "wilful", "wilfully" and "wilfulness", when used in a statute creating or defining an offense, the use thereof imports something more than a mistake or negligence. **Spies v. United States**, 317 U. S. 492, 498, 87 L. Ed. 418, 422; **United States v. Murdock**, 290 U. S. 389, 394, 78 L. Ed. 381, 385, 54 S. Ct. 223; **Potter v. United States**, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

(6) General Ration Order 8, containing 21 sections and 12 amendments thereto, and Revised Ration Order 3, containing 135 sections and 35 amendments thereto, and the several sections of these orders referred to in the indictment, are so inconsistent, contradictory, intricate, complex and confusing that it cannot be told with reasonable certainty what acts prohibited by these orders and regulations constitute penal offenses under the statute involved in the indictment, so that any conviction thereunder would constitute a denial of due process as required by the 4th and 6th amendments to the Constitution of the United States.

The regulations, and particularly those with respect to ration banking, are not within the framework of any legislative standards laid down by the Act.

Even a statute must be sufficiently definite to warn the alleged violator of the nature of the acts that may be penalized. (**Panama Refining Co. v. Bryan**, supra; **United States v. Darby**, 312 U. S. 100; **Pierce v. United States**, 314 U. S. 306, 312, 86 L. Ed. 225, 231; **Lanzetta v. New Jersey**, 306 U. S. 451, 83 L. Ed. 888.)

Wherefore, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case entitled on its docket: Francis X. Gomila versus United States of America, No. 10, 255, to the end that said case may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code (U. S. C. A., Title 18, Sec. 47) and the applicable rules promulgated by this Court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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JOHN E. ROBINSON,
L. E. GWINN,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

OPINION OF LOWER COURTS.

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals appears at page 390 et seq. of the record.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended, the Act of Congress of March 8, 1934, Rule 11 of the Rules of Practice and Procedure promulgated by this Court May 7, 1934, and Rule 37 (b) of the new Rules of Criminal Procedure, effective March 21, 1946.

The transcript of record in this case, including the proceedings in the Circuit Court of Appeals, has been filed herein in accordance with Rule 38 of this Court.

III.

SPECIFICATIONS OF ERROR.

The errors herein complained of have been set out in substance under "Questions Presented" in the petition, and will, therefore, not be specifically set out here.

IV.

THE FACTS.

The facts with respect to the Peerless Sugar Company, a registered wholesale grocery establishment owned by petitioner, and the St. Bernard Syrup Company, a trade name for the industrial establishment owned by him individually, have been recounted and in sufficient detail in the petition, but additional facts relating to the X-L Sales Company will be briefly stated.

Petitioner was interested in and operated the X-L Sales Company, which conducted a business in syrups and extracts and also a theatre business and woodworking business (R. 299) The X-L Sales Company operated five bottling companies which manufactured syrup and extracts, these being the Lirette Bottling Company, the Gold Dot Bottling Company, the Dixie Bottling Company, the Gulf Bottling Company and the Lime Cola Company (R. 299). The Lirette Bottling Company was originally located at Houma, Louisiana, the Gold Dot and Lime Cola in Gulfport, Mississippi, the Gulf at Bay St. Louis, and the Dixie in New Orleans. These were acquired in 1941 and 1942 and at first operated under the name of Mission Orange Bottling Company, a trade name (R. 133), but on account of conflicting with an establishment having a similar name was changed to X-L Sales Company (R. 134, 305).

Petitioner duly applied for and was granted a sugar base and allotments for all the companies operated under

the trade name Mission Orange Company and later under the X-L Sales Company, and there is neither claim nor evidence in the record that there was any misrepresentation or concealment in obtaining the sugar base and allotments for the X-L Sales Company (R. 360). Its books were examined by a representative of the OPA (R. 370).

Most of these companies were acquired in 1941, but the Lirette was acquired on or about August 17, 1942 (R. 300, 303).

On or about March 13, 1945, the files of all industrial users were transferred from the local Louisiana Boards to the District Office in New Orleans (R. 242), and thereafter Thibaut, its Sugar Rationing Officer, withheld the allotment from the X-L Sales Company as well as the St. Bernard Syrup Company. Petitioner personally, through his auditor and through attorneys, sought to ascertain the reason why, but was only told that an allotment would not be issued until petitioner was "cleared by Enforcement" (R. 228, 229, 249, 361, 363).

When Thibaut withheld the filing of the application for an allotment made by the X-L Sales Company (R. 244) he notified the Regional Office of the OPA at Dallas and, in reply, was instructed not to issue any allotments "until the X-L Sales Company was cleared by the Enforcement Division" (R. 225, 228). But petitioner was not informed, either before or after such instructions were received by Thibaut, of the grounds on which action was being deferred on the applications (R. 228, 229, 230, 245, 249, 282, 361).

So far as deemed relevant, other facts relating to the X-L Sales Company will be stated in the argument.

ARGUMENT.

The issues of law and fact, presented by the petition, will be discussed under separate headings, each indicating the scope of the argument on the point therein stated. For this reason, and because the argument will be brief, it has not been summarized.

I.

The course pursued by the OPA Agencies in dealing with petitioner was so arbitrary, oppressive and fraudulent that it should not be sanctioned or condoned by the courts.

The indisputable facts supporting the foregoing statement, as it applies to the St. Bernard Syrup Company, have been fully stated in the petition and will not be repeated here.

As conceived by us, the nature of the action taken or withheld against the X-L Sales Company is of minor, if any, importance in determining the issues raised by the petition. But be that as it may, the undisputed testimony shows that the action with respect to the X-L Sales Company was extremely arbitrary and, like that taken with respect to the St. Bernard Syrup Company, in flagrant violation of applicable OPA regulations. In effect, but without making any record of his official action, Thibaut, Sugar Rationing Officer of the OPA at New Orleans, suspended the right of petitioner and his industrial establishments to allotments of sugar, and neither he nor the Regional Office of the OPA at Dallas, when he reported his action with respect to the X-L Sales Company to that office, gave petitioner any notice or any reason why these allotments were suspended further than to tell him that he would not be given any sugar until the X-L Sales Company had been cleared by the Enforcement Division of the OPA (R. 228, 229, 230, 361). Cleared of what?

Neither petitioner nor any of his auditors or attorneys was furnished any reason for the secret investigation of the X-L Sales Company.

Thibaut, in his testimony at the trial, did not disclose the nature of any claimed irregularity or violation of regulations in the registration and operation of the X-L Sales Company further than to say that in an audit made by him he found what he thought was an incorrect registration (R. 247).

The Lirette Bottling Company, one of the five bottling companies owned by the X-L Sales Company, was registered as one of the units operated under the trade name "Mission Orange Bottling Company", later changed to "X-L Sales Company" and the Lirette Bottling Company, after its purchase by petitioner, was registered: "Mission Orange Bottling Company, formerly Lirette" (R. 239).

The right of the Lirette Bottling Company to a sugar base was conceded by Thibaut in his testimony (R. 240) but it was his contention that the OPA office at Terrebonne Parish was in error in accepting the registration under the name "Mission Orange Bottling Company, formerly Lirette" (R. 240). After the sugar base for the Mission Orange and the units thereof, including the Lirette Bottling Company, had been fixed and allotments issued on that base, the Mission Orange Company was combined or consolidated with X-L and the name changed to X-L Sales Company, this being done with the approval of the OPA (R. 242, 246).

Three years after the registration of the Lirette Bottling Company as one of the units operated under the trade name "Mission Orange", later changed to X-L Sales Company (R. 241, 242, 243), was approved by the OPA and the parties had acted on and under that registration, Thibaut reached the conclusion that it should have been registered in the name of Lirette (R. 242). An examina-

tion of his own testimony on cross-examination shows that this conclusion was destitute of either a factual or a legal basis (R. 240-245).

When a business was purchased or transferred, it was necessary that the transferee continue to produce the same class of products but he was not required to operate under the same trade name (R. 166). In connection with Thibaut's claim that the board then having jurisdiction of the matter made a mistake in registering the Lirette Bottling Company, purchased by petitioner under the trade name of Mission Orange Company, later changed to the X-L Sales Company with the knowledge of OPA agencies, it is significant that neither Thibaut nor any other OPA official disclosed or suggested such a claim to petitioner, his auditor or his attorneys when they diligently and persistently sought to ascertain the reason why X-L Sales Company allotments had been suspended.

The Court of Appeals, in its opinion, assumes but does not decide that the action of the OPA officials at New Orleans was unjustified and arbitrary (R. 392, 393). In discussing this point, it makes the naive suggestion that petitioner took no steps to review the administrative action under which the allotments were withheld and refers to 2nd Revised Ration Order 3, section 11.1(a), which provides a review under certain circumstances, but fails to indicate how the shuffling of the St. Bernard Syrup Company file between OPA agencies, the apparent studied efforts to conceal the location thereof from petitioner and the broken promises to return this file to Memphis and notify him when it was received in Memphis could be reviewed under the regulation referred to, which is set out in full in the Appendix.

Moreover, the action of the OPA officials was equivalent to a suspension of the sugar rights of petitioner and in flagrant violation of applicable OPA regulations. Such

rights can only be suspended after notice, stating specifically the alleged violation and giving an opportunity for a hearing in which the respondent may produce witnesses and be represented by counsel. Section 4.1, Article IV of General Ration Order No. 8, authorizing administrative suspension of registrants who violate a ration order and Sections 2.1-2.3 of Procedural Regulation 4, prescribing the procedure to be followed in suspension proceedings, are set out in the Appendix.

Condemnation without a hearing is repugnant to the due process clause of the Federal Constitution and contrary to the very genius of free institutions, but that was precisely the course pursued by Thibaut and other OPA officials in the instant case. Had they deliberately planned to destroy the business of petitioner, their course would not have been materially different from the one followed in dealing with the applications for sugar allotments made by his establishments after the first quarter of 1945. What did petitioner or any of his agents, employees or associates do that remotely justified such a course? Nothing that is disclosed by the record.

II.

In determining the guilt or innocence of petitioner on the counts on which he was convicted, it is entirely immaterial whether he had a legal right to transfer the consumer sugar ration stamps delivered by him to Blen when petitioner obtained 3,000 pounds of sugar for the purpose of storing it until he could obtain the ration documents to which he was entitled as an industrial user and which he expected to deliver to the Peerless Sugar Company in exchange for the sugar acquired by him and stored as its agent and representative.

Petitioner, when he obtained the 3,000 pounds of sugar from Blen, acted in good faith, believing that he could

obtain the sugar as an agent and representative of the Peerless Sugar Company and thereafter surrender to that company the requisite amount of sugar ration documents (R. 276, 277, 295), which, as an industrial user, he expected to receive without delay, having been assured that the issuance thereof was in process of consummation, the assurance thus given being predicated upon statements and promises of OPA officials, established by undisputed evidence, to which reference has heretofore been made.

In view of the number and complexity of sugar ration regulations, the frequency with which they were changed and particularly because the statute only provides penalties for wilful violations, the good faith of petitioner, although he may have been mistaken in his interpretation of the regulations, should be a complete defense. To hold otherwise is either to eliminate or so narrowly construe the word "wilful," used in the statute, as to make it meaningless as it therein appears.

On the direct issue, raised by Count I, as to whether petitioner knowingly used, possessed or transferred counterfeit sugar ration stamps, the jury accepted the testimony of petitioner and found him not guilty under that count. This verdict of the jury was apparently overlooked by the Circuit Court of Appeals when it held that the motion for a directed verdict was properly overruled (R. 392, 393). At page 392 it states that the "stamps were printed upon dark paper plainly different in color from the paper of the genuine stamps." All the testimony, including that of OPA officials who handled these stamps, and the so-called expert witness, Mrs. Lastinger, testified that the stamps appeared to be genuine and that any difference between them and genuine stamps would not be noticed by anyone but an expert (R. 104-105, 115).

There was evidence on the part of one of the OPA officials with respect to a difference in the appearance of stamps filed as an exhibit to the testimony of Mrs. Lastinger, the so-called expert who testified for the government, but this testimony related to stamps identified by her as genuine and had no reference to the stamps involved in the indictment (R. 115, 116, 180).

At page 391 of the opinion, the Circuit Court of Appeals comments upon the testimony of the government witness Blen that petitioner, when notified by that witness that the stamps he received from petitioner had been returned as counterfeit, insisted that they were not and told the witness to say that he had received them from someone in Mississippi. Petitioner denied making such a statement and it was so thoroughly discredited by other evidence that the jury was entirely justified in rejecting it. Blen was requested by petitioner to call at the OPA office and ascertain the basis of their contention about the stamps and inform petitioner what they said. This Blen promised to do but did not keep that promise (R. 69).

Moreover, Blen, shortly after the transactions, made an affidavit which he testified was a "full, true and correct statement" (R. 70) and which Overton, an official of the OPA, testified contained the "full" facts as stated by Blen (R. 70, 120). In this affidavit there was no suggestion that petitioner had asked Blen to furnish any misinformation as to the source from which he obtained the stamps.

The evidence that the stamps were counterfeit was restricted to the testimony of Mrs. Lettie Lastinger, a government witness employed by the Office of Price Administration in the Verification Center in Atlanta, Georgia, who first examined the stamps in the office of the OPA En-

forcement Attorney in Memphis, Tennessee, on January 16, 1946 (R. 101). Prior to her employment by the OPA in Atlanta, Mrs. Lastinger was a general clerk for the Sinclair Refining Company in its Southeastern Office in Atlanta and prior to her employment by the OPA had no experience in the examination and inspection of currency or ration coupons or stamps of any kind (R. 105). Her training consisted of four weeks study under a Mr. Watts and a Mrs. Sherlock from the National Coding Office in Washington, whose experience and qualifications, if any, were not known to the witness (R. 105). In making her examination of the stamps, Mrs. Lastinger did not use a light or chemicals, but made the examination only with her eyes (R. 113, 114).⁷

III.

The judgment of conviction herein is void in that (a) the statute (50 U. S. C., Title 50, App., Sec. 633), as applied to the acts for which petitioner was convicted contains no warning or notice that such acts constitute or may be made criminal offenses; (b) the regulations involved are not within the framework of any legislative standards established by the statute; (c) these regulations are so numerous, inconsistent, contradictory, complex, confusing, and were changed so frequently that it could not be told with reasonable certainty what acts were permitted or prohibited by these regulations.

So far as material the applicable provision of the statute involved reads as follows:

“ * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for

⁷ Petitioner objected to the testimony of Mrs. Lastinger on the ground that it was in conflict with generally known scientific principles and without probative value. This objection was overruled (R. 374).

private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense" (U. S. C., Title 50, App. 633, subsection 2).

The validity of the statute and the regulations was duly challenged by grounds V, VI and VII of the demurrer to the indictment (R. 9, 10) and also by the Fifth ground of the motion for a directed verdict (R. 11).

To be valid, a statute, creating criminal offenses, must be sufficiently definite to warn the alleged violator that he is or may be subject to the criminal penalties of the act. **Panama Refining Co. v. Ryan**, 293 U. S. 388; **United States v. Darby**, 312 U. S. 100; **Pierce v. United States**, 314 U. S. 306, 312, 86 L. Ed. 226, 231; **Lanzetta v. New Jersey**, 306 U. S. 451, 83 L. Ed. 888.

What is there in the provision of the statute quoted that even suggests the detailed regulations with respect to ration banking or that the statute intended it to be a criminal offense to fail to deposit sugar stamps, lawfully acquired, in such an account and draw checks against it instead of using the stamps themselves?

The regulations, and particularly those with respect to ration banking, are not within the framework of any legislative standards laid down by the Act.

The power conferred upon the President, or any administrative agency to which he may delegate that power, may aptly be described in the language of Justice Cardozo in his concurring opinion in **Schechter Poultry Corp. v. United States**, 295 U. S. 495, 553, as "delegation running riot." The same logic that would sustain the provision of the act under consideration could be applied to sanction an abdication by Congress of all its functions and a dele-

gation to the President of complete legislative power over the lives and property of the citizens.

For instance, if Congress should provide that the President, when **"satisfied"** that it would serve the public interest or promote the national defense, could promulgate such regulations as he deemed necessary or appropriate in carrying out the objectives expressed in the preamble to the Constitution of the United States, could in effect make any law that was not prohibited in express terms in other sections of the constitution, and such an act, while it might be broader in scope, would not be materially different in principle from that challenged in the instant case.

The Emergency Price Control Act of 1942, sustained in *Bowles v. Willingham*, 321 U. S. 503, and in *Yakus v. United States*, 321 U. S. 414 (50 U. S. C., App., Sec. 901 et seq.), did at least suggest some standard, such as "prices prevailing" between certain dates, to be considered in promulgating regulations (50 U. S. C., App., Sec. 902), but the statute involved in the instant case leaves the regulations, including the standard to be followed in making them, entirely to the discretion of the President. To sustain such an act is, for all practical purposes, a delegation to the Chief Executive of the authority to make laws according to the standards prescribed by him and not even suggested in the statute authorizing regulations on the subject covered.

IV.

The Circuit Court of Appeals failed and refused to apply corrective processes to erroneous rulings on evidence as set out in **"E"** of the petition.

The evidence complained of was clearly prejudicial to the petitioner.

Petitioner, as heretofore stated, was operating in thirty-seven different States, including Tennessee, and was engaged in the beverage business and making extracts, syrups and concentrates before this country entered the war and before any sugar rationing regulations were issued (R. 335). **Considering the magnitude and extent of his operations, there was nothing unusual about the amount of sugar allotted to him (R. 336).**

It is a matter of common knowledge that many people and families had difficulty in obtaining sufficient sugar for their daily household needs and the jurors naturally would be expected to entertain prejudice against an industrial user of sugar whose concerns had received 4,500,000 pounds of sugar between August, 1942, and December, 1944, regardless of his legal right to obtain and use that quantity of sugar. It is clear of doubt that bringing these matters to the attention of the jury was prejudicial to the accused. **Sparks v. United States**, 6th Cir., 241 Fed. 777-790.

The material point was, whether petitioner was entitled to an allotment for the second quarter of 1945 in excess of 3,000 pounds, and it is clear of doubt that he was legally entitled to such an allotment for the St. Bernard Syrup Company. Consequently, the right to an additional allotment for the X-L Sales Company was an immaterial consideration. However, the X-L Sales Company was entitled under the regulations to an allotment for the second quarter of 1945 unless its right to sugar was withdrawn or suspended by an appropriate proceeding (R. 160, 172).

The vice in permitting an examination into the acquisition and operation of the companies under the trade name of X-L Sales Company was the opportunity it afforded for the Government to claim that there had been illegal registration of some of the companies acquired by appellant, a claim bolstered by the assertion of Thibaut, and to bring

to the attention of the jury the large amount of sugar used in the operations of that company.

If appellant had illegally registered any company, or violated any law in the conduct of the companies operating under the trade name of X-L Sales Company, the OPA could and should have established that fact in accordance with the procedure set up by the regulations and having failed to do this, neither it nor the Government should have been permitted during the trial of this case to charge or insinuate that petitioner's companies had not been properly registered and particularly where there was neither claim nor evidence of any concealment or misrepresentation on his part in connection with any registration.

It would be an impeachment of the legal learning of the attorneys for the Government in this case to say that they did not know that the jury had no power or duty to review action taken by OPA Boards in Louisiana having jurisdiction over petitioner's registrations, and it must therefore be presumed that the only purpose the prosecution had in bringing the matters under discussion to the attention of the jury was to create an unfair prejudice. What relevancy to any issue on trial would the quantity of sugar allotted to appellant and his enterprises prior to the second quarter of 1945 have on any issue presented by the indictment? What purpose, in introducing this evidence, other than the creation of an unfair prejudice, is even suggested by the record?

Having presented the evidence for that purpose, the Government cannot now be heard to say that it failed to have the intended effect. **Pierce v. United States**, 6th Cir., 86 F. 2d 949; **Coulson v. United States**, 10th Cir., 51 F. 2d 178.

This evidence, calculated, if not intended, to create an unfair prejudice against appellant, also violated two estab-

lished rules, (1) the rule with respect to relevancy, and (2) the rule that cross-examination must be restricted to the scope of direct examination (*Sawyer v. United States*, 202 U. S. 150, 167).

In Wharton on Criminal Evidence, 11th Ed., Sec. 226, the author says:

“The admission of irrelevant facts which have a prejudicial tendency is fatal to a judgment.”

The limits of this brief preclude a discussion of other rulings on evidence, referred to in the petition.

V.

Extraneous matters injected into the proceedings, and particularly those pointed out in “F” of the petition, show a studied effort by the prosecution, and particularly on the part of OPA officials, to create an unfair prejudice against petitioner.

The OPA officials, aided by government attorneys, were successful in getting before the jury petitioner’s investigation by law enforcing agencies, including the United States Attorney at New Orleans (R. 249); information that the OPA had “completed” its case against him in that city and was ready to refer it to the District Attorney there (R. 195); an audit of the “X-L violation”, the nature of the claimed violation not being disclosed (R. 247); an unsupported assertion by an OPA official that petitioner had violated the conditions under which he was permitted to transfer the business purchased by him from the Memphis Tobacco Company under the trade name St. Bernard Syrup Company from Memphis to New Orleans (R. 201).

Furthermore, there was a persistent effort on the part of the Assistant United States Attorney to bring to the

attention of the jury a case from the 5th Circuit, claimed to be in conflict with the ruling of the trial court in this cause, that the records were the best evidence of an official action taken by the OPA (R. 245-247), and the insinuation through questions, destitute of any basis in the record, that petitioner had disposed of 460,000 pounds of sugar between December 15, and December 31, 1944 (R. 311-313).

True it is, that the Court instructed the jury to disregard many of these matters that were voluntarily injected into the proceedings by OPA officials testifying as witnesses, but no instruction could have removed the impression they were calculated to make.

In asking the insinuating question last referred to, the Assistant United States Attorney plainly violated the rule pronounced by this Court in *Berger v. United States*, 295 U. S. 78, and by the Circuit Court of Appeals for the 3rd Circuit, in *United States v. Nettl*, 121 F. 2d 927, 930.

It is, of course, not permissible under federal rules to show that the accused has been indicted or charged with the commission of other offenses. In considering the effect on the jury of unproven charges, such as those so often injected into the trial in the instant case, it is immaterial whether these were brought to the attention of the jury directly or by innuendo or insinuation. *Pierce v. United States*, 6th Cir., 86 F. 2d 949; *Coulson v. United States*, 10th Cir., 51 F. 2d 178; *Little v. United States*, 8th Cir., 93 F. 2d 401; *Middleton v. United States*, 8th Cir., 49 F. 2d 538-540.

In rejecting the contention of petitioner that he was denied a fair and impartial trial, the Court of Appeals (Opinion, R. 394, 395) states that the principal instances were brought out by counsel for petitioner and amplified

by cross-examination. In this, the Circuit Court of Appeals was in error.

In his petition for a rehearing in that Court, petitioner pointed out the unsound premises, including a misquotation of the record, on which that Court predicated its conclusions and, instead of repeating what was there said, we refer to Section II of that petition (R. 404-408). The Circuit Court of Appeals, in denying the petition for a rehearing, corrected its misquotation of the record but did not correct its erroneous conclusion that was founded in part on the misquotation as well as a misapprehension of the testimony.

The statement of the Circuit Court of Appeals in its opinion (R. 396) that "if prejudice was created, it was created by appellant's attorneys", is likewise destitute of any basis in the record.

Petitioner does not wish to appear unduly critical of the opinion but respectfully asks these questions:

Upon what theory can it be asserted that petitioner's counsel were responsible for the statement of Government witness Stewart, in response to a question asked by Government counsel on redirect examination, a statement based wholly on hearsay information, that petitioner had violated the conditions under which the syrup and extract business purchased by him was transferred from Memphis to Louisiana (R. 201)?

Or, for the statement volunteered by Thibaut that he had made an "audit of the X-L violation", a statement entirely irrelevant to any question asked by petitioner's counsel (R. 247)?

Or, for the statement volunteered by Thibaut that the Enforcement Division of the OPA had turned petitioner's

case over to the United States Attorney in New Orleans, which had not the slightest relevancy to the question asked (R. 247)?

And wherein was it an effort to get error into the record to ask the Court to exclude collateral matters after it appeared that the purpose of the Government, in going into these matters, was to emphasize the quantity of sugar obtained by petitioner and not to show any violation of ration orders or regulations on his part (R. 354, 355)?

Without pursuing these inquiries further, it is respectfully insisted that petitioner did not have a fair trial, that the Court of Appeals failed to apply corrective processes to errors committed by the trial court and that the case should be reviewed by this Court and the judgments against petitioner reversed.

THOMAS L. ROBINSON,
JOHN E. ROBINSON,
L. E. GWINN,
Counsel for Petitioner.

APPENDIX.

Gen. RO 8.

Sec. 2.8. Wrongful acquisition, possession, use or transfer of rationed commodity.

No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rational commodity acquired in violation of a ration order.

Sec. 2.9. Transfer in exchange for invalid or improperly acquired ration document.

No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it.

Second Revised Ration Order No. 3.

Sec. 3.3. Industrial user allotments—(a) General. To enable an industrial user to get and use sugar at his industrial user establishment, he is given an allotment for each use or product for which he has established a base-period use in accordance with General Ration Order 16. Allotments are given for fixed periods called allotment periods. The allotment periods are the following quarterly periods:

- (1) First quarter: January to March, inclusive;
- (2) Second quarter: April to June, inclusive;

- (3) Third quarter: July to September, inclusive;
- (4) Fourth quarter: October to December, inclusive.

(b) Application for allotments. An industrial user's registration on OPA Form R-1200 is treated as an application for an allotment for his industrial user establishment for the quarterly period beginning January 1, 1944. Application for any other allotment period must be made, in person or by mail, to the Board with which his establishment is registered. No particular form need be used for such application. The application, however, must be in writing and must be made not more than fifteen days before, nor more than five days after, the beginning of the period. However, the Board may permit an application to be made at any time before an allotment period under such circumstances as the Washington Office of the Office of Price Administration may direct. The Board, in its discretion, may also permit an application to be made at any time within the allotment period, but if it is made more than five days after the beginning of the period, the industrial user's allotment shall be reduced by an amount which bears the same proportion to the allotment as the number of days which have elapsed from the start of the period bears to the total number of days in the period.

(c) Amount of allotment. The amount of an industrial user's allotment is determined on the basis of his use of sugar at his industrial user establishment during the quarter in the base period (1941) corresponding to the allotment period. (General Ration Order 16 describes the way in which base-period use for each quarter in the base period is determined.) The amount of sugar used by him during the quarter for which he has established a base-period use is multiplied by the percentage or percentages fixed in section 19.2 for that use or class of products and

the numbers which result are added, and the total is his allotment, stated in pounds, for that use or class.

Sec. 7.2 Nature and validity of certificates and stamps.

(a) A certificate or stamp may be transferred only for the purpose of authorizing the consumer or registering unit to whom the certificate or stamp was issued to take delivery of the amount of sugar specified on the certificate or assigned to the stamp in Section 19.3, Schedule C, of this order, and to permit the registering unit to which the certificate or stamp has been surrendered to take delivery of sugar in order to replenish its sugar inventory. Stamps in the hands of a consumer are valid only if attached to a War Ration Book.

(b) Each stamp authorizes delivery of sugar to a consumer only during the ration period assigned to such stamp in section 19.3. A stamp received in accordance with this order by a registering unit, which is neither a depositor nor required to be one, authorizes the registering unit to take delivery of sugar in an amount equal to the weight value of the stamp if such stamp is surrendered to another registering unit or a primary distributor within a month of the close of the ration period assigned to such stamp. A stamp surrendered to a depositor shall be valid for deposit in his account for a period of a month and ten days after the close of the ration period assigned to such stamp: Provided, however, That, notwithstanding anything to the contrary contained in this order, Stamp No. 12 may, on or before July 31, 1943, be surrendered by a registering unit which is not and is not required to be a depositor to authorize the registering unit to take delivery of sugar and may be deposited on or before August 10, 1943. Except as provided in paragraph (f) of Section 7.1, a depositor may issue checks at any time against credits

created by the deposit of a stamp. Stamps numbered one through eleven shall not be valid for deposit. If the ration period assigned to a stamp ends on a day which is not the last day of a calendar month and the next calendar month has a day which corresponds thereto, then a "month," as used in this paragraph, is the period from the last day of the ration period to and including the corresponding day of the next calendar month; otherwise it is the period from the last day of the ration period to and including the last day of the next calendar month.

(c) A certificate may be used at any time by the person to whom it is issued, if he is not a depositor nor required to be one, to take delivery of sugar. A certificate duly transferred by endorsement to a registering unit that is neither a depositor nor required to be one, may be used at any time by such registering unit to take delivery of sugar. A certificate issued or duly transferred to a depositor is valid for deposit in his account at any time. However, a certificate which expired before January 1, 1944, may not be transferred or deposited and does not authorize a delivery of sugar. (Any certificate expiring on or after that date is revalidated by this paragraph.)

(d) A primary distributor receiving certificates, or a registered wholesaler receiving stamps or certificates, from a registering unit upon request may deliver to such registering unit a quantity of sugar equal to the weight value of the stamps and certificates so received, plus an additional quantity equal to either: (1) an amount, not in excess of 10% of the weight value of the stamps or certificates so received, required to make a total quantity equal to that contained in a Shipping Unit; or (2) an amount not in excess of ninety-nine (99) pounds, required to permit delivery in shipping packages customarily used by the person making the delivery.

If the amount of sugar delivered is greater than the weight value of the certificates and stamps received the person accepting the delivery shall be charged with such excess and shall surrender stamps or certificates of weight value equal to such excess before accepting delivery of any additional sugar from any person.

(e) As used in this section the term "registering unit" includes industrial user establishments and establishments registered under General Ration Order 5 as Groups II, III, IV, V and VI institutional user establishments.

Sec. 3.18. Use of allotments on and after January 1, 1944.

(a) On and after January 1, 1944, except as may be permitted by the Washington Office of the Office of Price Administration, an industrial user who obtains an allotment under this order may use sugar allotted to him only for the use or for the production of the product on which his base period use was established, or for a use or for the production of a product included in the same class, according to the following classes:

1. Bread and other bakery products.
2. Baking mixes, including batters.
3. Breakfast cereals; and cereal paste products such as spaghetti and macaroni.
4. Ice cream; ices; sherbets; frozen custards; and mixes used for these purposes.
5. Condensed milk in containers of one gallon or less; cheese; other dairy products not included in other items; frozen eggs; and sugared egg yolks.
6. Bottled beverages (alcoholic and non-alcoholic); flavoring and coloring extracts; fountain syrups; drink

mixes; brandied fruits; maraschino cherries; fountain fruits; pickled fruits and vegetables; relishes.

7. Mayonnaise and salad dressing.

8. Products fried in fat (except bakery products) such as nuts, potato chips.

9. Candy; chocolate; cocoa; chewing gum.

10. Sandwiches.

11. Dehydrated and dried soup and soup mixes.

12. Canned and bottled foods (not included in other items); table syrups.

13. Experimental, educational, demonstration, and testing purposes.

14. Pharmaceuticals (internal); allergy foods; vitamin oils; cough drops.

15. Pharmaceuticals (external).

16. All other classes; Food.

17. All other classes: Non-food.

(b) No industrial user may use more sugar in any allotment period for any purpose or use for which allotments may be obtained than his allotment for that period plus any unused part of his allotments for earlier periods. Sugar used under an allotment before the beginning of the period for which it was granted shall, for the purposes of this paragraph, be considered to have been used in the period for which it was granted.

(c) On and after January 5, 1944, an industrial user may not use sugar for any use or purpose unless he has registered his industrial user establishment on OPA Form R-1200.

So far as material Section 18.1 2d Rev. RO 3 reads as follows:

“ * * * Meaning of terms used in this order. (a) Whenever the provisions of this order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the person owning such establishment or registering unit with respect thereto. Whenever reference is made to an act done or to be done, or to property owned, by an establishment or a registering unit, it shall be deemed to refer to an act done or to be done, or to property owned by the person owning such establishment or unit in its behalf.”

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Sub-section (9) “Industrial user” means any “person” who has an “industrial user establishment.” “Industrial user establishment” means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers. It also includes any establishment (except an establishment at which sugar is used only for educational purposes under the direction of the Department of Agriculture or the Extension Service of the Department of Agriculture) at which sugar is used for experimental, educational, testing, or demonstration purposes, whether or not a product resulting from such uses is to be used in the preparation or service of foods or beverages which the establishment or its owner serves to consumers. An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases.

Section 4.1, Article IV of General Ration Order No. 8, reads as follows:

“Any person who violates a ration order may, by administrative suspension order, be prohibited from receiving any transfer or delivery of, or from selling,

using or otherwise disposing of, any rationed commodity. Proceedings for suspension orders shall be in accordance with the provisions of Procedural Regulation No. 4 of the Office of Price Administration."

Article II of Rev. PR 4, above referred to, contains these provisions:

"**Sec. 2.1 Institution of proceedings.** A proceeding for the issuance of a suspension order shall be instituted by the service of a notice of hearing upon the respondent not less than seven (7) days before such hearing.

"**Sec. 2.2 Notice of hearing.** (a) A notice of any hearing to be held pursuant to this regulation shall be issued by the District Enforcement Attorney. It shall set forth the time and place of hearing, a clear statement of the charges against the respondent with a reference to the particular section of the regulation or order involved or alleged to have been violated, and a statement of the purpose or purposes for which the hearing is to be held. The notice shall also state that a suspension order may be entered by default in case of failure to appear at the hearing.

"(b) A copy of Revised Procedural Regulation No. 4 shall be attached to the notice of hearing served upon any respondent.

"**Sec. 2.3 Conduct of hearing.** (a) Any hearing held pursuant to this regulation shall be conducted by a Hearing Commissioner or by a Presiding Officer designated by the Chief Hearing Commissioner to conduct the hearing. The Hearing Commissioner or Presiding Officer shall preside at the hearing, administer oaths and affirmations, and rule on the admission and exclusion of evidence.

"(b) The hearing shall be so conducted as to permit the presentation of evidence and argument to the fullest extent compatible with fair and expeditious determination of the issues raised in the hearing. To this end:

“(1) The respondent shall have the right to be represented by counsel of his own choosing.

“(2) The Hearing Commissioner or Presiding Officer shall afford reasonable opportunity for cross-examination of witnesses.

“(3) All hearings held pursuant to this regulation shall be public.”

2nd Rev. R. O. 3, Sec. 11.1 (a), reads as follows:

“A person may appeal from any action of the Board, District Office, or Regional Administrator adverse to such person. Such appeal shall be brought in accordance with the terms and provisions of Procedural Regulation No. 9.”

Procedural Regulation No. 9 reads as follows:

“Time within which appeal must be brought. A Board, District Office or Regional Office shall give notice of its action, except as otherwise provided in a ration order or regulation, to the person who has the right of appeal or to his agent, at its office or by mail. The appeal must be brought within 30 days after such mailing or the giving of such other notice. However, if the appellant shows good cause for his failure to file his appeal within the time prescribed by this section, such thirty-day period may be waived.”